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No. 02-563

In the Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF PAUL DEPARRIE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Paul deParrie ("deParrie") hereby submits this *amicus curiae* brief in support of the Petition For Writ Of Certiorari ("Petition") filed by Petitioners American Coalition of Life Activists ("ACLA"), et al. DeParrie has a unique role in this case and was treated as an *amicus* in this case while it was pending in the Ninth Circuit.[1] Counsel for Petitioners and Respondents have consented to the filing of this brief.

DeParrie was editor-in-chief of *Life Advocate* magazine for ten years because he felt that it provided the best forum for his writer/journalist vocation and his public activism. (Trial Tr. 2813-14) The magazine covered a wide range of news and commentary on national and international issues, much of it written by deParrie himself. (Trial Tr. 2813-14) *Life Advocate* magazine was destroyed by this litigation. (deP. Rep. Br. p. 7)

DeParrie has two distinct First Amendment interests in this case. First, deParrie is a published author and journalist who was credentialed as a journalist by the District Court in this very action so that he could cover the trial for *Life Advocate* magazine (Lodging, p. 1 or "L 1")[2]. One of his news stories about the "wanted-style" posters was classified as a threat by the District Court. (L 2-9)

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[1] DeParrie originally became active in the Ninth Circuit as a *pro se* appellant-non-party-in-interest. After he filed an opening brief and a reply brief, the three-judge panel treated deParrie as *amicus curiae*. His briefs filed with the Ninth Circuit will be cited herein as "deP. Op. Br." and "deP. Rep. Br."

[2] Lodging pages are designated by "L."

Second, deParrie is a political activist in the pro-life field, much of whose activism was conducted under the auspices of a defendant in this action, Advocates for Life Ministries ("AFLM"), a federally tax-exempt nonprofit organization that has also been destroyed by this litigation. DeParrie has designed and distributed other posters more confrontational in nature than those at issue in this case (L 12-23) – both before and after the alleged "poster pattern" theory was created for this case. Yet an Oregon Court of Appeals has deemed those other posters to be protected speech. *Hanzo v. deParrie*, 953 P.2d 1130 (OR. Ct. App. 1998). AFLM was, in turn, associated with petitioner ACLA, an unincorporated association of pro-life activist groups and individuals.

The District Court verdict and injunction ("Order") poses serious problems for deParrie in both capacities. First, in an amazing procedural twist that defies any traditional concept of due process, deParrie was enjoined by name in the Order even though he was not a party to the case, and then denied standing as an appellant in the Ninth Circuit. Like the Petitioners, deParrie is therefore enjoined from publishing, republishing or even *possessing* copies of the subject posters and website content, or their undefined "equivalent," and he is also prohibited from publishing, republishing or merely possessing "personally identifying information" about any of the respondents. (Order, p. 68) Second, the jury imposed aggregate damages of $109 million, in part because of an article that deParrie wrote in *Life Advocate* about a poster.

Thus, deParrie may be subjected to future contempt citations and/or imprisonment under the Order, not to mention massive damage claims, for basic First Amendment activity that would never be questioned in any other context. The Ninth Circuit Majority decision imperils the personal and

professional life of anyone courageous enough to publish articles or distribute protest literature condemning any of the respondents, for anything construed as "republication" of the posters or their "equivalent", or for publishing anything deemed to qualify as "personally identifying information" about any of the respondents. For these compelling personal and professional reasons, deParrie now appears in support of the Petition.

No counsel for a party authored this brief in whole or in part. The Life Legal Defense Foundation, P.O. Box 2105, Napa, CA 94558, contributed to the cost of printing this brief, but no other person or entity made a monetary contribution

STATEMENT OF THE CASE

DeParrie hereby adopts and incorporates by reference the Statement Of The Case presented in the Petition. Additional facts relevant to deParrie's interest are discussed in the context of specific issues below.

REASONS FOR GRANTING THE WRIT

This Court has previously reviewed First Amendment restrictions when "the question presented [was] of substantial importance". *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). The ominous threats to both free speech and freedom of the press - threats that somehow survived the scrutiny of the Ninth Circuit Majority - present questions equally important to justify the writ of certiorari.

The actual effect of the harms which the Ninth Circuit finds acceptable to legitimate First Amendment interests are discussed below from the perspective of an activist/journalist.

I. The Ninth Circuit's 6-5 affirmance of a plainly unconstitutional verdict and injunction is a direct attack on freedom of the press for amicus and all similarly situated commentators and activists.

> The general proposition that freedom of expression upon public questions is secured by the First *Amendment has long been settled by our decisions*. The constitutional safeguard, we have said, 'was fashioned to assure *unfettered interchange of ideas for the bringing about of political and social changes desired by the people*.' Roth v. United States, 354 U.S. 476, 484.

New York Times v. Sullivan, 376 U.S. 254, 269 (1964) (Emphases added).

> Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity. [The Government] thus carries a heavy burden of showing justification for the imposition of such a restraint.

New York Times Co. v. US, 403 U.S. 714, 714 (1971) (citations omitted).

> Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints.

Id. at 717

These principles were frontally attacked by the Ninth Circuit Majority's reversal of the decision of the three-judge panel. Even *responsible* coverage of an important and hotly-debated national political issue is no longer safe.

For example, when a debate arose over the moral legitimacy of the use of force to stop abortions arose after Michael Griffin shot abortionist David Gunn in 1993, *Life Advocate* provided a forum for the best commentaries on both sides of the issue. Even when the magazine took an editorial position some months later, deParrie insured that all sides continued to get equal coverage. In fact, the balance tipped slightly in favor of those opposed to the use of force. (deP. Op. Br. p. 67) Such debates were a singularly important component of this nationally-circulated magazine.

The March 1995 issue of *Life Advocate* magazine carried deParrie's news story about the release of the "Deadly Dozen" poster (L 2-9), but it also included reports on other ACLA activities in Washington, D.C. during the *Roe v. Wade* anniversary. In fact, the March 1995 *Life Advocate* carried 21 other news stories, 14 letters to the editor, 5 commentaries, 4 cartoons, 5 "quotable quotes", and 1 photo essay.[3] The news coverage included a story about an ACLA picket held at Foundry Methodist Church (where then-President Bill Clinton was attending services)[4], a protest at the offices of the Health and Human Services against fetal experimentation, and a candlelight vigil conducted in front of an abortionist's house. Sidebar stories included information on the annual March for Life, the introduction of the ACLA as a group, an anti-abortion group from Ireland whose members traveled to Washington, D.C. for the activities, and a simple columnar list of the abortionists listed in the "Deadly Dozen" poster.[5] (L 9) Neither the poster itself, nor any actual representation of it, appeared in the magazine.

True freedom of the press ended with the verdict and Order. Not only had the posters themselves been declared "true threats," but the *news story* about one of the posters (largely written and photographed by deParrie) was deemed

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[3] None of this was allowed to reach the jury as "context."

[4] The Majority makes quite an issue of the "grim reaper" on the cover of the magazine (Op. at 7095), but the picture is merely one of the protesters standing outside President Clinton's church. It had nothing to do with the "Deadly Dozen" poster.

[5] While the names and some addresses of abortionists were listed there, the sidebar about the ACLA also listed names and addresses of the ACLA's leaders (L 6).

a "republication" of the poster and, thus, a "true threat." (L 2-9) Under the Order, the *news article* was deemed a "true threat" when in the possession of any defendant or those in "active concert with them." (Order, p. 65) DeParrie was even required to surrender to the District Court his personal family archive copy of the March 1995 issue of *Life Advocate* magazine. (deP. Rep. Br. p. 3) The District Court later ordered AFLM to cease paying its bills (rent, electric, etc.), to put all financial assets in the AFLM bank account, and not to remove them for any purpose. (deP. Rep. Br p. 7-8) Consequently, AFLM and *Life Advocate* ceased to function, and deParrie lost his job.

The Ninth Circuit has construed FACE, RICO and the First Amendment to prohibit journalist deParrie from writing a *news story* which included *information* about the content of a poster. Worse yet, it is the *informational content* that deParrie described from the poster, *not the poster format*, that allegedly made deParrie's news story a "republication" of a "true threat".

The threat to a free press is simply unprecedented.

II. The Ninth Circuit Majority Has Abandoned Any Pretext Of Protecting Controversial Speech.

The Majority's "poster pattern" theory departs radically from this Court's teaching that the only actionable "pattern" where speech is concerned requires incitement followed by imminent lawless action.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of

> law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg v. Ohio, 395 US 444, 447 (1968)

The Majority evaded a proper application of that precedent by inventing a new category of actionable speech: "threat" by remote temporal association with *past* violence, following the speech of persons *other than Petitioners*. The significance of Petitioners' explicit advocacy for *lawful* action to bring abortionists to justice was effectively disregarded in favor of a theory that has no precedent in American law, and which allowed a jury to impute to Petitioners a state of mind directly contrary to what they actually said.

The Majority further undercuts the principle that free speech is best served when it is robust and even disturbing.

> *Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases*. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action, they must be regarded as protected speech*. To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.

NAACP v. Claiborne Hardware, 458 U.S. 886, 929 (1982) (Emphases added)

> Accordingly, a function of free speech under our system of government is to invite dispute. *It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.* Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (Emphasis added).

As least as they apply to that "currently disfavored class of antiabortion protestors", *Lawson v. Murray*, 515 U.S. 1110, 1113 (1995) (Scalia, J., concurring in denial of cert.), the Ninth Circuit now limits free speech and freedom of the press to "dulcet phrases" and "safe" protests.

III. The Ninth Circuit has imposed an indiscernible standard for pro-life speech and journalism.

According to the Ninth Circuit Majority, the threat lies not in the content of the posters - *which the Ninth Circuit concedes is protected* even though the jury was not so informed — but rather in the posters' so-called "wanted-style *format.*" The Majority concluded that publication of earlier posters with a "similar" format, created and circulated by people other than petitioners, was followed months later by isolated acts of violence against persons named in these earlier posters. (deP. Op. Br. p. 32) The Majority dubs this temporal and coincidental relation between posters and violence as "the poster pattern", and converts future posters

with the same or "similar" format into *per se* death threats against the persons named, *regard-less of what the posters say*. (Majority Op. 7091, 7137)

The Majority's "poster pattern" theory defies the principle that restrictions on speech must give fair warning of what speech or conduct is proscribed. *Coates v. Cincinnati*, 402 U.S. 611 (1971). The Petition properly raises a vagueness challenge and refers to the "standardless speech restriction" now in place. *Petition at 14.* As a matter of due process, a law is void if persons of common intelligence must necessarily guess at its meaning and differ as to its application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Although vagueness challenges are most commonly raised in challenges to criminal statutes, they are no less important in a civil context when political activists can be crushed, as in this case, with punitive monetary sanctions infinitely beyond what anyone could ever pay. When an unprecedented and ill-defined First Amendment theory is unanimously rejected by the original three judge panel and then barely accepted by a 6 to 5 en banc majority, it is fair to say that the creation has and will "trap the innocent by not providing fair warning". *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The principles set in motion by the Majority threaten ongoing deprivations of liberty and property without due process of law. Nowhere does the Majority give any guidance for identifying the actionable elements of the now-forbidden "wanted-style format", much less how one can determine the undefined "equivalent" of this format, which is also banned under the injunction. Instead, the Majority opinion offers the following:

It is not the words or captions chosen that make a "wanted-style" poster (Majority Op 7137-38).

It is the "WANTED" or "unWANTED" poster "*format*" that is forbidden by FACE and RICO (Majority Op. 7137-38).

This "wanted-style format" does not require use of the words "WANTED" or "unWANTED" (Majority Op. 7137-38).

The forbidden format may, or may not, use any of the words used in the previous "pattern" posters on Gunn, Patterson, and Britton (Majority Op. 7137-38).

The words used do not have to contain explicit threats (Majority Op. 7137-38).

The words do not have to contain ambiguous threats (Majority Op. 7137-38).

It is possible to use the forbidden "format" while publishing content that calls only for only lawful, peaceful protest
(Majority Op. 7137-38).

The words chosen are, in fact, "immaterial," according to the Majority. (Majority Op. 7137)

The forbidden "format" need not have any direct connection to any act of violence to gain

> "currency as a death threat" (Majority Op. 7121).
>
> The forbidden "format" need have only a remote or tangential relationship to *three* acts of violence (but not two acts of violence) in order to gain "currency as a death threat," even if thousands of other protest posters naming abortion doctors have no relationship, even merely temporal, to violence (Majority Op. 7121; Trial Tr. 2828; deP Rep. Br. p. 32).

This is the "unascertainable standard" prohibited in *Coates* and dozens of other cases. Because the forbidden "format" does not depend on content and is never described, neither deParrie (nor any other publisher) can know for sure what violates the Order, or FACE generally. The only safe course for them is to cease publishing any posters, or indeed anything at all, concerning the respondents.

IV. The Ninth Circuit has effectively outlawed a classic form of political activism.

As a writer, deParrie has studied the history of political activism, especially the use of handbills and posters. The accusatory poster has been a staple in this country since before the Revolution, and in deParrie's life, since the Vietnam war. (Trial Tr. 2793)

A poster that declared President John F. Kennedy "wanted" for "treason" was handed out in the days preceding – and even on the day of - his assassination. (L 10) The JFK "wanted" poster was later evidence before the Warren Commission. Such posters are common currency in

American political activism.[6] Prior to this case, the Ninth Circuit recognized that the threshold of a "true threat" against the President is *lower* than for threats against private citizens, *U.S. v. Twine*, 853 F.2d 676 (9th Cir. 1988). It now appears that in the Ninth Circuit abortionists enjoy greater protection that the President.

The Majority's observation about the use of the posters in this case was very selective. The Majority was correct, for example, when it observed that Petitioners knew of the three previous incidents where abortion workers were killed,[7] but far more clear (and sharing no such emphasis) was Petitioners' awareness that the anti-abortion movement had been issuing countless such posters for many years *without* subsequent violence. Petitioners were aware that such violence was *an anomaly*, not the norm. (Trial Tr. 2828; Kozinski Dissent 7157) Many of the Petitioners were readers of *Life Advocate*, which carried regular stories about the use of posters in various locales. DeParrie testified at trial about having personally seen hundreds of such posters and having in his possession in court about 85 of them. (L 24-67) None

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[6] A "WANTED" poster of President George W. Bush (L 11), recently handed to deParrie at a May Day Rally in Portland, Oregon, appears on the website www.motherearth.org /bushwanted.

[7] The Majority repeatedly observes that these posters were issued prior to the deaths of the named abortionists, yet never points out that the posters were followed only remotely by violence – and in Patterson's case, remotely in distance from place the posters were published (i.e Pensacola, Florida, whereas the scene of the violence against Patterson was Mobile, Alabama).

of the subjects of those posters had been shot or killed. (Trial Tr. 2828)

Furthermore, in 1995, deParrie organized, under AFLM, the S.H.A.M.E.[8] Campaign, which consisted of picketing the home of an abortionist each month. Part of the process was to create a poster of each abortionist, complete with picture, home address, and phone numbers. The posters were then passed out door-to-door in the neighborhood during the picket. After a 16 month campaign, 15 abortionists had been picketed, including the separate residences of Plaintiffs (Respondents) James Newhall and Elizabeth Newhall (L 12, 16, 17, and 18), whose neighbors received a copy of the posters. Neither of the Newhall's took any legal action or bought bullet-proof vests in response to the posters and pickets. ***None*** of those so picketed were shot at or killed (deP. Rep. Br. p. 32), nor were the posters even part of the complaint in this case.

One reaction to the S.H.A.M.E. campaign did come from Jude Hanzo, executive director of Portland Feminist Women's Health Center, Inc. After two pickets were held in front of her house (eight months apart), Hanzo sued deParrie under Oregon's stalking law with a complaint replicating all the specious and overreaching "context of violence" claims made in this case. After the trial court ruled that deParrie was a stalker, the Oregon Court of Appeals reversed on constitutional grounds. *Hanzo v. deParrie*, supra. The posters were described in detail, *Hanzo* at 530-32, and are

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[8] The acronym stands for: Stigmatize, Harangue, Agitate, Mortify, and Expose.

functionally indistinguishable from the "Deadly Dozen" and "Crist" posters in this case.

As the *Hanzo* decision makes clear, deParrie's own S.H.A.M.E. campaign posters were issued long after the "third strike" – the shooting of Dr. Gunn – which, according to the Majority, rendered all such posters "true threats." Evidently, the Oregon Court of Appeals lacks the creativity displayed by the Ninth Circuit and the District Court in this case, and could not discern the "poster pattern".

In any event, the compelling need for review of the Ninth Circuit Majority's decision rests not only on the mind-boggling damage award, but also on the First Amendment confusion that lives on with the Order. After the District Court issued it, and not wanting to violate it, deParrie approached the Court for permission to display a poster and a 15' x 3' banner that he had designed before the Order was issued.[9] (L 68) Respondents objected to the Court's rendering an opinion on the poster and banner, and the Court refused to do so on the premise that such a ruling would be premature. (deP. Op Br. p. 27)

Unless this Court reviews the Ninth Circuit decision, there is no telling what will be construed as a "WANTED-style" poster. Because the Majority deems actual content unimportant, nearly any anti-abortion leaflet distributed near an abortionist could be so construed. Consequently, the only way for deParrie or anyone else to know whether a poster/banner/leaflet is a forbidden "equivalent" is to risk

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[9] The Order specified that the court retained jurisdiction "for all purposes, including * * * interpretation" of the Order (Order, pp. 69-70).

criminal prosecution by daring to engage in this classic form of political protest.

CONCLUSION

For the foregoing reasons, as well as the reasons articulated by Petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas Condit